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January 28, 2008

Dirk Kempthorne
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dale Hall
Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

**Re: Notice of Violations of the Endangered Species Act in Revising ESA Section 10(j)
Regulation for the Central Idaho and Yellowstone Area Nonessential Experimental
Populations of Gray Wolves in the Northern Rocky Mountains**

Dear Secretary Kempthorne and Director Hall:

On behalf of Minette Glaser, Defenders of Wildlife, Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, The Humane Society of the United States, Jackson Hole Conservation Alliance, and Friends of the Clearwater, we write to provide you notice, pursuant to 16 U.S.C. § 1540(g), that the U.S. Fish and Wildlife Service ("FWS" or "Service") decision to modify the "Special Regulation for the Central Idaho and Yellowstone Area Nonessential Experimental Populations of Gray Wolves in the Northern Rocky Mountains" ("section 10(j) regulation"), 73 Fed. Reg. 4720 (January 28, 2008), violates the Endangered Species Act ("ESA"). The groups listed above submitted extensive comments on the proposed revision of the section 10(j) regulation. We attach those comments and incorporate them by reference.

The stated purpose of modifications to the section 10(j) regulation is to allow states to kill wolves that are having an "unacceptable impact" on populations of elk, deer, and other wild ungulates. Yet elk populations are thriving in Idaho, Wyoming, and Montana, including in many areas where wolves are present. The rule gives states almost limitless discretion to decide what impacts, other than an actual population decline, are unacceptable. Specifically, FWS' examples of unacceptable impacts include impacts on "population or herd numbers, calf/cow ratios, movements, use of key feeding areas, survival rates, behavior, nutrition, and other biological factors." 73 Fed. Reg. 4722. The section 10(j) regulation thus gives states a blank check to invoke any excuse for killing wolves, including circumstances when elk, as a prey response, avoid areas like open meadows and state-run feedgrounds.

In addition, the section 10(j) rule allows extensive wolf killing even while the northern Rockies wolf population has not reached numbers or connectivity that will ensure its long-term viability. Scientists have concluded that a continuous population of at least 2,000-5,000 wolves is necessary to ensure a genetically viable northern Rockies wolf population over the long term. Further, the current wolf population must expand to achieve necessary connectivity between the three wolf recovery areas in the Greater Yellowstone ecosystem, central Idaho, and northwest Montana. To date, there is no indication that connectivity has been achieved; wolves in the Greater Yellowstone recovery area remain genetically isolated from wolves in central Idaho and northwest Montana. The section 10(j) rule will only exacerbate currently inadequate conditions.

In committing the fate of experimental wolf populations in the northern Rockies to the hostile state governments of Idaho and Wyoming, which have vowed to kill all but one hundred wolves within their borders, see May 2007 and August 2007 Earthjustice Comment Letters on Gray Wolf Delisting, FWS' new section 10(j) regulation fails to fulfill the conservation mandate of the Endangered Species Act and its implementing regulations. If implemented, the section 10(j) regulation will set back wolf recovery by radically reducing wolf numbers, substantially reducing occupied habitat, and fracturing potential connectivity routes between core populations. Wolves deserve a place on the landscape in the American West. That can only be achieved in the long run by promoting acceptance for natural wolf behaviors. Predation on elk must be accepted if wolves are to survive in the West.

I. FWS Violated Its ESA Duty To Conserve Endangered Species.

The purpose of the Endangered Species Act ("ESA") is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species" and to achieve the purposes of international conservation treaties and conventions. 16 U.S.C. § 1531(b). Consistent with the purposes of the ESA, Congress declared "that all Federal departments and agencies shall seek to conserve endangered species and threatened species, and shall utilize their authorities in furtherance of the purposes" of the ESA. 16 U.S.C. § 1531(c)(1). In defining "conservation" of threatened and endangered species, Congress provided a very limited definition of when regulated taking could be utilized in the name of conservation: "and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking." Id. § 1532(3); see also Sierra Club v. Clark, 755 F.2d 608, 613 (8th Cir. 1985) ("before the taking of a threatened animal can occur, a determination must be made that population pressures within the animal's ecosystem cannot otherwise be relieved"). Thus, under the express mandates of the ESA, FWS is obliged to affirmatively promote recovery of listed species until they are fully recovered and removed from the list of endangered species, and may not authorize taking of listed wolves except as expressly authorized in § 1532(3). The new section 10(j) regulation violates section 2 of the ESA, 16 U.S.C. § 1531, in the following ways:

A. The Section 10(j) Regulation Jeopardizes Recovery of Wolves in the Northern Rockies.

FWS has emphasized repeatedly the need for an “equitable distribution of wolf breeding pairs” among the three states and for wolves to successfully travel between Yellowstone, central Idaho, and northwestern Montana public land areas. See, e.g., Appendix 9 to Gray Wolf Reintroduction Draft EIS (“The importance of movement of individuals between sub-populations cannot be overemphasized.”); 70 Fed. Reg. 1,289 (January 6, 2005); FWS Northern Rocky Mountain Gray Wolf Recovery Plan at 13 (1987); 72 Fed. Reg. at 6,121; 72 Fed. Reg. 36,945. FWS has stated that its gray wolf demographic recovery standards for the northern Rockies are minimum requirements, and would require connectivity, including genetic interchange, between gray wolves in the Yellowstone, central Idaho, and northwestern Montana areas. This minimum threshold has not been met. Even with approximately 1,500 wolves in the northern Rockies, there is no evidence that any wolf from central Idaho or northwestern Montana has ever contributed genetic material to wolves in the Yellowstone ecosystem. The Greater Yellowstone recovery area is almost entirely isolated from individual wolves from central Idaho and northwest Montana. Oakleaf (2006) at 561. The section 10(j) rule will cause small core populations of wolves to become even smaller and thus will further impede dispersal that the FWS has recognized is necessary for wolves’ long-term survival and recovery.

The new regulation also jeopardizes recovery of wolves in the northern Rockies by authorizing killing of more than half of the current wolf population, which is already insufficient to ensure viability over the long term. As we explained thoroughly in the attached comment letters, to avoid the adverse genetic effects of inbreeding, a total population of 2,000-5,000 wolves achieving a metapopulation dynamic is necessary to ensure population viability. See, e.g. Earthjustice Comment Letter, RIN No. 1018-AU53 (May 8, 2007). Isolated populations of merely 200 individuals, as may result from the section 10(j) regulation, are not capable of maintaining genetic diversity sufficient to withstand environmental variability and stochastic events.

Likewise, the section 10(j) regulation fails to ensure wolves are distributed throughout each State affected by the new regulation, as required by the Service’s own gray wolf recovery plan. Under the new rule, the only substantive restraint on state wolf killing due to impacts on ungulate populations is the requirement that FWS determine—at the time of permitting—that the wolf killing “will not contribute to reducing the wolf population in the State below 20 breeding pairs and 200 wolves, and will not impede wolf recovery.” 73 Fed. Reg. 4736 (§ 17.84(v)(B)). Because there are no distribution requirements, no state is required to maintain wolf packs well distributed throughout their state.

B. The Section 10(j) Regulation Authorizes Extensive Wolf Killing With No Legitimate Conservation Purpose.

Just as there is no biological basis for the increased wolf killing in the name of ungulate management or to protect stock animals and dogs, there is no biological basis for wolf killing in the name of wolf conservation. The proposed rule asserted that a “potential benefit [of the section 10(j) regulation] may be a lower level of illegal take of wolves due to higher local public

tolerance of wolves resulting from reduced conflicts between wolves and humans.” 72 Fed. Reg. 36,946. In response to public comments, FWS now purports to disavow this justification for the 10(j) rule change. 73 Fed. Reg. at 4,729 (conceding that “data are not available to support or disclaim this premise”). It is apparent, however, that this social science proposition continues to be the Service’s motivation for the new rule. See id. at 4,732 (stating that the wolf-killing provisions of the section 10(j) rule “are necessary for the continued enhancement and conservation of wolf populations because they foster local tolerance of introduced wolves”). Indeed, absent this justification, FWS proffers no wolf conservation purpose for the wolf-killing proposal whatsoever.

The federal courts have rejected this “social tolerance” approach to conserving endangered species. Humane Society of the United States v. Kempthorne, 481 F. Supp. 2d 53, 63 (D.D.C. 2006) (federal Judge Kollar-Kotelly agreeing with federal Judge Huvelle’s observation: “I have a hard time understanding the notion you kill the wolves to save the wolves.”). In addition, recent evidence makes clear that the premise is wrong—despite repeated efforts to increase the amount of government-authorized wolf killing in the Northern Rockies, see, e.g., 70 Fed. Reg. 1,286, Idaho and Wyoming are on record as wanting to kill wolves to the absolute minimum numbers permitted by FWS as soon as possible. See May 2007 and August 2007 Earthjustice Comment Letters on Gray Wolf Delisting. Thus, aside from an unjustified and unwarranted social engineering proposition, FWS offers no biological justification for authorizing large numbers of endangered wolves to be killed for impacting their natural prey species.

There is no legitimate conservation purpose of elevating perceived needs of abundant wild ungulate populations over the need to protect and conserve small populations of endangered wolves. The Endangered Species Act does not provide for such balancing. The Supreme Court has determined that it is “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” Tennessee Valley Authority v. Hill 437 U.S. 153, 174 (1978) (emphasis added). Furthermore, predation by wolves on ungulates, and the attendant changes in ungulate behavior that allow for heightened survival of plant species represent exactly the ecosystem conservation benefits that are the purpose of the ESA; that purpose will be subverted if the actions that help conserve ecosystems – natural predation on ungulates – are defined as a problem to be solved.

C. The Section 10(j) Regulation Fails to Include Essential Standards for Wolf Killing.

The section 10(j) regulation further violates the ESA’s direction to conserve endangered species because it allows virtually standardless wolf killing. First, the rule lacks safeguards to prevent excessive wolf killing, including a mechanism by which to cancel the wolf-killing authorization. For example, once FWS approves a state’s determination that wolves are having an unacceptable impact on ungulates, the state may kill its population down to 200 wolves even if other factors are driving the wolf population to extinction. 73 Fed. Reg. 4736 (§ 17.84 (n)(4)(v) providing a mechanism for wolf-killing approval, but no mechanism for revocation of that approval).

Because it fails to take into account fundamental principles of wolf biology and behavior, the section 10(j) regulation also presents the real potential that state wolf populations could drop below the 200-wolf minimum established by the rule. The rule authorizes states to indiscriminately eliminate breeding members of the population, thus reducing the likelihood that packs will breed in the year following the wolf killing. When one alpha wolf is removed from a pack, the probability that the pack will successfully breed the following year is generally halved. S.M. Brainerd, et al. (2006) at 22, The effects of alpha wolf (*Canis lupus*) loss on reproductive success and pack dynamics (In press), (cited in 71 Fed. Reg. 43,410, 43,421 (Aug. 1, 2006)). When both alpha wolves are killed, the result is “generally catastrophic for the short-term reproductive potential of the pack.” *Id.* at 23. This impact is exaggerated for smaller or less concentrated wolf populations, as an alpha wolf that is eliminated from a pack generally must be replaced by a mature wolf from an adjacent pack to allow the pack to persist and produce pups the following year. *Id.* at 18.

The rule also fails to consider unintended consequences of the impact of killing individual members of a wolf pack on the pack’s social structure and behavior, including predation behavior. FWS has not studied these potential impacts, even though research indicates that killing members of a wolf pack may encourage remaining wolves to seek easy prey, such as cattle and sheep. These impacts may further affect wolf survival in the northern Rockies.

The section 10(j) regulation also violates the ESA because it delegates the Service’s ESA duty to conserve wolves to the states, without essential oversight or substantive sideboards on state action. Most notably, FWS allows the state to define “unacceptable impacts” to ungulates, with no method for FWS to assess whether a state-defined ungulate management standard—such as no wolves within a specific geographic area—comports with the ESA’s preservationist mandate. The rule lacks any mechanism of ensuring the scientific integrity of state actions to implement the new section 10(j) regulation.

II. The Section 10(j) Regulation Violates ESA § 4(d).

The gray wolf 10(j) regulation is promulgated under authority of ESA section 4(d).

Any population determined by the Secretary to be an experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act with respect to such population. The Special rules (protective regulations) adopted for an experimental population under § 17.81 will contain applicable prohibitions, as appropriate, and exceptions for that population.

50 C.F.R. § 17.82. ESA section 4(d) regulations must be developed to promote conservation of the species. 16 U.S.C. § 1533(d). The Service’s authorization for states to kill all but 600 wolves of the current population of approximately 1,500 gray wolves in the northern Rockies is inconsistent with the requirements of the ESA to protect threatened species and their habitat. For the same reasons set forth in Part I, *supra*, the Fish and Wildlife Service’s action violates ESA section 4(d).

III. The Section 10(j) Regulation Violates ESA § 10(j).

ESA section 10(j) requires that "each member" of an experimental population be treated as "threatened," under the ESA. 16 U.S.C. § 1539(j)(2)(c). The Service's authorization for states to kill all but 600 wolves of the current population of approximately 1,500 gray wolves in the northern Rockies is inconsistent with the requirements of the ESA to protect threatened species and their habitat. For the same reasons set forth in Part I, supra, the Fish and Wildlife Service's action violates ESA section 10(j).

IV. The Section 10(j) Regulation Violates 50 C.F.R. § 17.82.

The section 10(j) regulation also violates FWS's ESA section 10(j) implementing regulations. Subpart H—Experimental Populations of volume 50 of the Code of Federal Regulations, 50 C.F.R. §§ 17.80-17.84, sets forth the Service's regulations governing experimental populations. Experimental populations are by definition comprised of individual members of endangered or threatened species. 50 C.F.R. § 17.81(a). Section 17.82 requires the Secretary to establish "Prohibitions" to protect the members of an experimental population. The section 10(j) regulation is not a "protective" regulation designed to promote recovery of the gray wolf. For the same reasons set forth in Part I, supra, the section 10(j) regulation is not a "protective" regulation authorized by 50 C.F.R. § 17.82, and is therefore unlawful.

V. Conclusion.

For all of these reasons set forth above and more fully in the comment letters of Earthjustice, Defenders of Wildlife, Natural Resources Defense Council, Sierra Club, Humane Society of the United States, Center for Biological Diversity, Jackson Hole Conservation Alliance, and Friends of the Clearwater, the decision to modify the "Special Regulation for the Central Idaho and Yellowstone Area Nonessential Experimental Populations of Gray Wolves in the Northern Rocky Mountains" is arbitrary, capricious, an abuse of discretion, and contrary to the Endangered Species Act and its implementing regulations.

Accordingly, we are notifying FWS that it has 60 days to withdraw the final rule modifying the section 10(j) regulation. If the agency does not do so, we intend to file suit in federal district court to ensure that the mandates of the Act are fulfilled, and to ensure that nonessential, experimental population of gray wolves receive the legal protections to which they are entitled under the Act.

Sincerely yours,



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